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8 UNITED STATES DISTRICT COURT
9 WESTERN DISTRICT OF WASHINGTON
AT TACOMA

10 RICHARD F.,

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12 Plaintiff,

13 v.

14 COMMISSIONER OF SOCIAL
15 SECURITY,

16 Defendant.

CASE NO. 3:19-CV-5478-DWC

ORDER AFFIRMING
DEFENDANT'S DECISION TO
DENY BENEFITS

17 Plaintiff filed this action, pursuant to 42 U.S.C. § 405(g), for judicial review of the
18 Commissioner of the Social Security Administration's ("Commissioner") denial of Plaintiff's
19 application for disability insurance benefits ("DIB"). Pursuant to 28 U.S.C. § 636(c), Federal
20 Rule of Civil Procedure 73, and Local Rule MJR 13, the parties have consented to have this
21 matter heard by the undersigned Magistrate Judge. *See* Dkt. 2.

22 After considering the record, the Court concludes the Administrative Law Judge ("ALJ")
23 properly analyzed Plaintiff's credibility and the lay opinion testimony. As the ALJ's decision
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1 finding Plaintiff not disabled is supported by substantial evidence, the undersigned affirms the
2 Commissioner's decision pursuant to sentence four of 42 U.S.C. § 405(g).

3 FACTUAL AND PROCEDURAL HISTORY

4 On March 11, 2016, Plaintiff filed an application for DIB, alleging disability as of
5 September 14, 2015. *See* Dkt. 16, Administrative Record ("AR") 15. The application was denied
6 upon initial administrative review and on reconsideration. *See* AR 15. A hearing was held before
7 ALJ Gerald J. Hill on May 11, 2018. *See* AR 15. In a decision dated July 17, 2018, the ALJ
8 determined Plaintiff to be not disabled. *See* AR 21. Plaintiff's request for review of the ALJ's
9 decision was denied by the Appeals Council, making the ALJ's decision the final decision of the
10 Commissioner. *See* AR 1; 20 C.F.R. § 404.981, § 416.1481.

11 In the Opening Brief, Plaintiff asserts the ALJ erred by failing to properly consider: (1)
12 Plaintiff's subjective symptom testimony; and (2) Plaintiff's spouse's lay witness testimony. Dkt.
13 13, pp. 3-12. Plaintiff requests remand for an award of benefits. *Id.* at p. 11.

14 STANDARD OF REVIEW

15 Pursuant to 42 U.S.C. § 405(g), this Court may set aside the Commissioner's denial of
16 social security benefits if the ALJ's findings are based on legal error or not supported by
17 substantial evidence in the record as a whole. *Bayliss v. Barnhart*, 427 F.3d 1211, 1214 n.1 (9th
18 Cir. 2005) (citing *Tidwell v. Apfel*, 161 F.3d 599, 601 (9th Cir. 1999)).

19 DISCUSSION

20 **I. Whether the ALJ provided specific, clear, and convincing reasons for finding** 21 **Plaintiff's subjective symptom testimony not fully supported.**

22 Plaintiff contends the ALJ erred by failing to provide specific, clear, and convincing
23 reasons for finding Plaintiff's subjective symptom testimony not fully supported. Dkt. 13.
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1 To reject a claimant's subjective complaints, the ALJ must provide "specific, cogent
2 reasons for the disbelief." *Lester v. Chater*, 81 F.3d 821, 834 (9th Cir. 1996) (citation omitted).
3 The ALJ "must identify what testimony is not credible and what evidence undermines the
4 claimant's complaints." *Id.*; *Dodrill v. Shalala*, 12 F.3d 915, 918 (9th Cir. 1993). Unless
5 affirmative evidence shows the claimant is malingering, the ALJ's reasons for rejecting the
6 claimant's testimony must be "clear and convincing." *Lester*, 81 F.2d at 834. Questions of
7 credibility are solely within the control of the ALJ. *Sample v. Schweiker*, 694 F.2d 639, 642 (9th
8 Cir. 1982). The Court should not "second-guess" this credibility determination. *Allen v. Heckler*,
9 749 F.2d 577, 580 (9th Cir. 1984). In addition, the Court may not reverse a credibility
10 determination where that determination is based on contradictory or ambiguous evidence. *Id.* at
11 579.¹ Plaintiff has a history of pancreatitis, dating back to as early as 2003. *See* AR 231. Plaintiff
12 reported that he experiences severe abdominal pain and occasionally severe headaches. AR 32-
13 33, 42. Plaintiff says he deals with his pain most of the time by sleeping. AR 34, 42. Plaintiff
14 testified he can drive short distances but cannot walk more than a couple of blocks. AR 35, 37.
15 Plaintiff said he can go to the grocery store alone, but has trouble doing chores around the house
16 such as laundry or doing the dishes. AR 35. Plaintiff reported that he can stand for 10 to 15
17 minutes but cannot lift garbage or laundry. AR 37. Plaintiff spends his time reading, watching
18 television, and spending time with his two pet cats. AR 35.

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22 ¹ On March 28, 2016, the Social Security Administration changed the way it analyzes a claimant's
23 subjective symptom testimony. *See* SSR 16-3p, 2016 WL 1119029 (Mar. 16, 2016); 2016 WL 1237954 (Mar. 24,
24 2016). The term "credibility" is no longer used. 2016 WL 1119029, at *1. Further, symptom evaluation is no longer
an examination of a claimant's character. *See id.* at *10 ("adjudicators will not assess an individual's overall
character or truthfulness"). However, the applicable Ninth Circuit case law still refers to the term "credibility." *See*
Trevizo v. Berryhill, 871 F.3d 664, 678 n.5 (9th Cir. 2017) (noting SSR 16-3p is consistent with existing Ninth
Circuit precedent). Thus, the Court will use "credibility" and "subjective symptom testimony" interchangeably.

1 Plaintiff has tried several medications in attempt to ameliorate his pain but consistently
2 reports that none provide any significant relief. *See* AR 246, 249, 266, 299, 326, 351. He
3 consistently reports he does not like opiates because of how they make him feel. AR 243, 249,
4 270. Plaintiff testified that enzyme therapy was helpful in treating his nausea and diarrhea but not
5 in treating his pain. AR 39, 297, 347.

6 After outlining the medical evidence contained in the record, the ALJ found Plaintiff's
7 "medically determinable impairments could reasonably be expected to cause the alleged
8 symptoms; however, the claimant's statements concerning the intensity, persistence and limiting
9 effects of these symptoms are not entirely consistent with the medical evidence and other evidence
10 in the record..." AR 18.

11 First, the ALJ discussed Plaintiff's testimony and found it was not supported by the
12 medical evidence of record, which the ALJ called "relatively sparse." AR 18. The ALJ essentially
13 found that Plaintiff's lack of treatment supports the conclusion of nondisability. A determination
14 that a claimant's complaints are "inconsistent with clinical observations" can satisfy the clear
15 and convincing requirement. *Regennitter v. Commissioner of Social Sec. Admin.*, 166 F.3d
16 1294, 1297 (9th Cir. 1998). Further, "[t]he ALJ is permitted to consider lack of treatment in his
17 credibility determination." *Burch v. Barnhart*, 400 F.3d 676, 681 (9th Cir. 2005). But an ALJ
18 cannot draw adverse credibility inferences based on failure to seek regular medical treatment
19 without first considering the claimant's explanations. SSR 96-7p, 1996 WL 374186, at *3 (July
20 2, 1996); *see also Fair v. Bowen*, 885 F.2d 597, 603 (9th Cir. 1989).

21 Plaintiff's counsel argues Plaintiff's loss of insurance is the reason why the medical record
22 is sparse. AR 31. Plaintiff's counsel also points out that Plaintiff is entirely reliant on his wife's
23 insurance, which has very limited coverage. AR 31. This requires Plaintiff to limit his clinical
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1 visits because he has to pay out of pocket for medication and doctor's visits. AR 31. Plaintiff's
2 counsel said this is another reason why the medical record is sparse. AR 31.

3 The ALJ considered, then addressed Plaintiff's loss of insurance and found it did not keep
4 Plaintiff from getting treatment for longer than a short time. AR 19. In support, the ALJ referenced
5 a medical note from PA-C Melissa Sharp, which stated that "[Plaintiff] experienced recent changes
6 in his insurance, with loss of employment for his wife. He is now back under the care of his
7 primary care team." AR 19, 347. However, the ALJ did not address the statement from Plaintiff's
8 counsel that because the insurance coverage is so limited, Plaintiff limits his clinical visits in order
9 to afford paying for them. The ALJ should have considered Plaintiff's explanations of why he
10 failed to seek medical treatment, which included his insurance's limited coverage and the
11 corresponding costs of paying for clinical visits. SSR 96-7p, 1996 WL 374186, at *3 (July 2,
12 1996); *see also Fair*, 885 F.2d 597 at 603. Thus, discounting Plaintiff's testimony regarding his
13 symptoms and limitations because he did not seek treatment is not a clear and convincing reason
14 supported by substantial evidence.

15 Second, the ALJ discussed the extent to which Plaintiff was treated, essentially finding
16 that Plaintiff's favorable response to conservative treatment undermines Plaintiff's report of
17 disabling pain. *See* AR 19. The ALJ noted that "[w]hen treated with enzymes, [Plaintiff's]
18 weight remained stable and he was free of constipation and diarrhea." AR 19. The ALJ supports
19 this finding with a citation to the record where PA-C Sharp indicated Plaintiff's weight remained
20 stable and Plaintiff reported no new diarrhea or constipation while taking the enzymes. AR 19;
21 AR 344. The ALJ also noted that Plaintiff's "[n]ausea and abdominal pain, while not completely
22 relieved, were ameliorated with treatment." AR 19.

1 An ALJ may consider “evidence of ‘conservative treatment’” in assessing a claimant’s
2 subjective symptom testimony. *Parra v. Astrue*, 481 F.3d 742, 750-751 (9th Cir. 2007) (quoting
3 *Johnson v. Shalala*, 60 F.3d 1428, 1434 (9th Cir. 1995)). Conservative treatment can be
4 “sufficient to discount a claimant’s testimony regarding [the] severity of an impairment.” *Id.*
5 Further, an ALJ may discount a claimant’s testimony when the claimant’s subjective
6 complaints of pain are inconsistent with the level of treatment received. *See Meanel v. Apfel*,
7 172 F.3d 1111, 1114 (9th Cir. 1999) (rejecting subjective pain complaints where petitioner’s
8 “claim that she experienced pain approaching the highest level imaginable was inconsistent with
9 the ‘minimal, conservative treatment’ that she received”).

10 Here, Plaintiff and several of his care providers indicated he responded favorably to the
11 enzyme treatment. PA-C Sharp said the enzyme therapy “has provided improved control of
12 [Plaintiff’s] chronic symptoms” and “[w]ith regular access to this therapy, and daily dosing, he
13 has improved abdominal pain, improved stooling and less nausea.” AR 353. Plaintiff also agreed
14 the enzyme treatment improved digestive health, yet did not help alleviate any pain. AR 39. But
15 Plaintiff noted that when he was off the enzymes, “he was significantly worsened...” AR 347.
16 Dr. Jason Sugar said Plaintiff’s “[p]ain is better when he takes his [enzymes]...” AR 350; *see*
17 *also* AR 291. PA-C Sharp indicated Plaintiff’s anti-nausea medication showed “great
18 improvement with his nausea.” AR 347. PA-C Sharp also stated that although Plaintiff was not
19 responding to standard therapies, she was “not inclined to give narcotic pain medication at this
20 time” and believed “[Plaintiff] also has functional symptoms.” AR 328. She opined Plaintiff’s
21 symptoms may be caused by irritable bowel syndrome and not pancreatitis. AR 328.

22 Other physicians also questioned Plaintiff’s diagnosis of pancreatitis. Dr. Mark Doane
23 stated he is “not 100% convinced it is chronic pancreatitis.” AR 267. Dr. Christine Pizzute said
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1 Plaintiff's diagnosis of pancreatitis was "somewhat in question" for her and noted Plaintiff's
2 report that his symptoms get better when he lays down is inconsistent with pancreatitis because it
3 often gets worse when lying down. AR 271. Dr. Sugar opined Plaintiff's chronic abdominal pain
4 is "somewhat atypical for chronic pancreatitis..." AR 291. Dr. Sugar also noted Plaintiff had
5 some improvement in his abdominal pain with the enzyme treatment. AR 291. *See Wilson v.*
6 *Colvin*, 2013 WL 4040122, at *7 (C.D. Cal. Aug. 8, 2013) ("An ALJ may properly rely on the
7 fact that medication is helpful to discount a claimant's credibility").

8 Further, the objective medical evidence supports the ALJ's conclusion that Plaintiff
9 responded favorably to conservative treatment. *See* AR 19. For example, several care providers
10 questioned whether Plaintiff's diagnosis of pancreatitis was correct, including PA-C. Sharp and
11 Drs. Doane, Pizzute, and Sugar. *See* AR 328, 267, 271, 291. Some of the treatment notes
12 indicated Plaintiff was receiving at least some amount of pain relief from his enzyme treatment.
13 *See* AR 291, 350, 353. Plaintiff had an endoscopy performed which revealed a normal
14 esophagus, stomach, and duodenum. AR 293. Plaintiff was diagnosed with internal hemorrhoids
15 and had a small benign polyp removed from his rectum during a colonoscopy, which reported an
16 otherwise normal exam of Plaintiff's colon. AR 294. A test analyzing Plaintiff's gastrointestinal
17 system found normal gastric emptying. AR 343. Finally, no care providers in the record found
18 Plaintiff's limitations disabling. *See Carmickle v. Comm'r of Soc. Sec. Admin.*, 533 F.3d 1155,
19 1161 (9th Cir. 2008).

20 The ALJ also cited Plaintiff's refusal of narcotics as support that Plaintiff responded
21 favorably to conservative treatment. AR 19. Where a claimant has good reason for not seeking
22 more aggressive treatment, a conservative course of treatment is not a proper basis for rejecting
23 the claimant's credibility. *Id.* at 1164. Here, Plaintiff consistently reported that he does not like
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1 opiates because of how they make him feel. AR 243, 249, 270. The ALJ did not consider why
2 Plaintiff repeatedly refused to try narcotics for his pain. Thus, Plaintiff's refusal of narcotics does
3 not support the ALJ's conclusion that Plaintiff responded favorably to conservative treatment.
4 See SSR 16-3p ("We will not find an individual's symptoms inconsistent with the evidence in
5 the record on this basis without considering possible reasons he or she may not comply with
6 treatment or seek treatment consistent with the degree of his or her complaints."). But, as
7 substantial evidence supports the ALJ's findings that Plaintiff responded favorably to
8 conservative treatment by participating in the enzyme treatment, this was a specific, clear, and
9 convincing reason to discount Plaintiff's subjective symptom testimony. See *Beistek v.*
10 *Berryhill*, 139 S. Ct. 1148, 1154 (2019) (citations and quotation marks omitted) ("substantial
11 evidence" means only evidence such that "a reasonable mind might accept as adequate to support
12 a conclusion").

13 Although the ALJ provided other reasons to discount Plaintiff's testimony, the Court
14 need not assess whether these reasons were proper, as any error would be harmless. See *Presley-*
15 *Carrillo v. Berryhill*, 692 Fed. Appx. 941, 944-45 (9th Cir. 2017) (citing *Carmickle*, 533 F.3d at
16 1162 (although an ALJ erred on one reason he gave to discount a medical opinion, "this error
17 was harmless because the ALJ gave a reason supported by the record" to discount the opinion).
18 Accordingly, the ALJ did not err in his credibility determination.

19 **II. Whether the ALJ provided germane reasons for discounting the lay**
20 **testimony.**

21 Plaintiff maintains the ALJ erred by discounting the lay witness testimony of his wife,
22 Rosemarie. Dkt. 13, pp. 9-10.

23 The ALJ gave Rosemarie's testimony partial weight and provided essentially the same
24 reasons he gave for discounting Plaintiff's testimony. See AR 19-20. The Court finds the ALJ's

1 reason for discounting Plaintiff's testimony that Plaintiff responded positively to conservative
2 treatment was specific, clear, and convincing. *See* Section I, *supra*. Thus, because the ALJ
3 provided specific, clear, and convincing reasons for rejecting Plaintiff's own subjective
4 complaints, and because Rosemarie's testimony was similar to such complaints, it follows that
5 the ALJ also gave germane reasons for rejecting Rosemarie's testimony. *See Molina v. Astrue*,
6 674 F.3d 1104, 1114 (9th Cir. 2012); *see also Valentine v. Comm'r Soc. Sec. Admin.*, 574 F.3d
7 685, 694 (9th Cir. 2009) (germane reasons provided for discounting a claimant's testimony are
8 also germane to similar testimony by a lay witness). Further, the Court need not assess whether
9 the ALJ's other reasons to discount Rosemarie's testimony were proper, as any error would be
10 harmless. *See Presley*, 692 Fed. Appx. 941 at 944-45 (citing *Carmickle*, 533 F.3d at 1162). Thus,
11 the Court affirms the ALJ's decision to discount Rosemarie's testimony. Accordingly, the ALJ
12 did not err.

13 CONCLUSION

14 Based on the foregoing reasons, the Court hereby finds the ALJ properly concluded
15 Plaintiff was not disabled. Accordingly, Defendant's decision to deny benefits is affirmed pursuant
16 to sentence four of 42 U.S.C. § 405(g).

17 Dated this 31st day of December, 2019.

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20 David W. Christel
21 United States Magistrate Judge
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